Supreme Court, U.S.
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88-1037 No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term of 1988

No. 88-_____

STATE OF ARIZONA,

Petitioner,

vs.

HONORABLE DANIEL E. NASTRO, a judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,

Respondent,

ELDEN GARDNER,

Real Party in Interest.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a white defendant is represented by black counsel, do the Fourteenth Amendment equal protection guarantees of Batson v. Kentucky and the Sixth Amendment right to an impartial jury require the prosecutor to explain his peremptory strikes of the only black veniremen on the panel?

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OPINIONS BELOW

The Arizona Court of Appeals held that, pursuant to Batson v. Kentucky,[1] a prima facie showing of purposeful discrimination was made when the prosecutor peremptorily struck both black veniremen from the jury of a white defendant who was represented by a black lawyer; it was, therefore, incumbent upon the prosecutor to articulate racially neutral reasons for these peremptory strikes. State v. Superior Court (Maricopa County), 156 Ariz. 512, 753 P.2d 1168 (App. 1987).

The Arizona Supreme Court affirmed the decision of the Court of Appeals and held further that, under the jury trial clause of the Sixth Amendment, the State may not make discriminatory use of the peremptory challenge to exclude any substantial and identifiable class of citizens from the privileges and obligations of jury service. State v. Superior Court in and for Maricopa County, ___ Ariz. ___, 760 P.2d 541 (1988).

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[1] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

STATEMENT OF THE CASE

Real Party in Interest Elden Gardner adopts the Statement of the Case set forth in the Petition for Writ of Certiorari with the exception that, contrary to the assertion in footnote 3, the record is clear that the trial judge Daniel E. Nastro concluded that a prima facie showing of racial discrimination had been made based upon the decision in Batson v. Kentucky. In deciding whether a prima facie showing had been made, Judge Nastro analyzed the relevant circumstances by referring to factors set forth in People v. Rousseau, 129 Cal.App.3d 526, 179 Cal.Rptr. 892 (App. 1982). As noted by the Arizona Court of Appeals, Judge Nastro based his request for a racially neutral explanation on Batson.

ARGUMENT I.

THE TRIAL COURT'S DECISION WAS IN ACCORDANCE WITH THE DICTATES OF THE EQUAL PROTECTION CLAUSE.

The trial judge correctly decided that Batson v. Kentucky required the prosecutor to explain his peremptory strikes of the only two black venire members. The trial judge considered all relevant circumstances, including the fact that this white defendant had a black lawyer, when he concluded that the defense had shown a prima facie case of discrimination against black jurors.

The State of Arizona claims that an "identical or similar" question is pending before this Court in Teague v. Lane, 820 F.2d 832 (7th Cir. 1987), cert.granted, ____ U.S. ____, 108 S.Ct. 1106 (Mar. 7, 1988) (Oct. Term 1987 No. 87-5259). Teague is not "identical," nor is it "similar." Teague, who had a white lawyer, did not claim that his Batson rights had been violated. Teague's claim was based solely on the Sixth Amendment. This Court did not address the Sixth Amendment issue in Batson although Batson had made his claim pursuant to the Sixth Amendment. Therefore, the case "similar" to Teague is Batson, not the instant case. Further, the citation to Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) is inapposite. Lockhart involved removal for cause of "Witherspoon-excludables" (those opposing the death penalty). Lockhart held that juries need not "mirror" the community. The Arizona Supreme Court [here] agreed. Moreover, in Lockhart, this Court carefully distinguished "death qualification" from the wholesale exclusion of blacks, women, or Mexican-Americans.

Citing to Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), the Arizona Court of Appeals and the Arizona Supreme Court set forth the "basic principle" that the law does not permit the State to discriminatorily exclude any substantial and identifiable class of citizens from the privilege and obligation of jury service. Peters v. Kiff, was an equal protection case. Peters, a white man, had standing to attack the systematic

exclusion of Negroes from grand jury and petit jury service. Given the rationale of Peters v. Kiff, the Arizona Supreme Court opined that the recent changes in the law worked by Batson and its progeny are more procedural than substantive.

The three Ninth Circuit decisions cited by the State are not in conflict with the Arizona Supreme Court in the instant case. In United States v. Vaccaro, 816 P.2d 443 (9th Cir. 1987), the Circuit Court held that striking two black jurors did not constitute a pattern of discrimination; however, even if it did, the prosecution had expressed a neutral, reasonable basis for its challenges. Further, the relevant circumstance of representation by a black attorney was not present in the Vaccaro case. In United States v. Chavez-Vernaza, 844 F.2d 1368 (9th Cir. 1987), Chavez, who is not black and who did not have a black lawyer, failed to make a prima facie case of discrimination and did not satisfy the Batson requirement that the excluded jurors be members of his race. Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988) involved a black defendant who had challenged the exclusion of all four blacks and two Hispanics from his jury. The circuit court held that Nevius' Fourteenth Amendment claim was precluded because the Batson rule is not retroactive.

In the eyes of the jury, lawyer and client are as one. Here, however, the prosecutor prevented Elden Gardner and his lawyer from enjoying those same rights a black defendant has under Batson. Equal protection does not presume to disadvantage any man because of the color of his appointed lawyer.

ARGUMENT II.

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION COMPELS THE RESULT REACHED BY THE ARIZONA COURTS.

The Sixth Amendment to the United States Constitution guarantees the right to an "impartial jury" comprised of a fair cross-section of the public. Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978); Ballard v. United States, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946). This right prohibits the State from discriminating in the selection of the jury venire and in the selection of the trial jury. The focus thus shifts from the defendant to the prospective jury.[2]

In its decision, the Arizona Supreme Court observed that neither Fourteenth Amendment equal protection nor the Sixth Amendment right to trial by a fair cross-section of the population gives the defendant the right to a trial jury of any particular composition. However, the Arizona Supreme Court emphasized that State discrimination against a distinctive group deprives a defendant of the opportunity to obtain a trial jury representing a fair cross-section of the community. The Arizona court properly adopted what it described as a "clear, simple rule: Under the jury trial clause of the Sixth Amendment, the State may not make discriminatory use of the peremptory challenge to exclude any substantial and identifiable class of citizens from the privilege and obligations of jury service." The application of this rule to the instant case was in accord with the dictates of the Sixth Amendment to the United States Constitution.

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[2]"The effect of excluding minorities goes beyond the individual defendant, for such exclusion produces 'injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.' " McCray v. New York, 461 U.S. 961, 968, 103 S.Ct. 2438, 2442, 77 L.Ed.2d 1322 (1983) (Marshall, J. dissenting from denial of certiorari and citing to Ballard v. United States, supra, in which this court reversed for exclusion of women from the jury panel.) See also: Marshall, J. dissent in Allen v. Hardy, 478 U.S. 1001, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986).

CONCLUSION

Under the narrowest reading of Batson v. Kentucky, the Arizona courts correctly applied the Batson rationale to this white defendant whose lawyer was black and from whose jury all blacks had been peremptorily excluded by the State. Moreover, the Sixth Amendment right to an impartial jury compelled the conclusion reached by the Arizona Courts.

Contrary to petitioner's assertion, enforcement of Fourteenth Amendment and Sixth Amendment rights will not sound the death knell for the peremptory challenge. Batson requires from the defendant a prima facie showing, failing which an explanation is not required. It is only the discriminatory use of the peremptory challenge which must be addressed. However, should enforcement of constitutional rights undermine the peremptory challenge, it is the peremptory challenge which must give way.[3]

The State's Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 17 day of January, 1989.

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[3]See discussion in State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (NJ 1986).